

Prosecutorial Discretion and Judicial Review: An Analysis of Recent Canadian and South African Decisions

Chuks Okpaluba

Research Fellow, Centre for Human Rights, University of the Free State
Okpaluba@mweb.co.za

Abstract

The question whether the functions performed by the prosecutor in the criminal justice system are subject to judicial scrutiny has been a matter for concern in common-law jurisdictions for quite some time. The courts in the Commonwealth generally agree that prosecutors must function independently; act fairly and responsibly in the interests of the public; and must be free from political interference. Their role in the administration of justice is to uphold the rule of law. Therefore, the exercise of prosecutorial discretion should ordinarily not be interfered with by the courts except in rare cases. However, the extent to which the courts, in respective Commonwealth jurisdictions, review prosecutorial discretions differs. A comparative study of the Canadian experience and the South African approach, where the judicial approaches to the review of prosecutorial discretion significantly differ, is a clear illustration. In Canada, the courts hardly interfere with, or review the manner in which the prosecutor performs his or her duties, except that prosecutorial discretion is not immune from all judicial oversight, since it is reviewable for abuse of process (see *R v Anderson* [2014] 2 SCR 167). In South Africa on the other hand, the exercise of the powers of the prosecutor and their ramifications are, like every exercise of public power, subject to the constitutional principles of legality and rationality. The recent judgments of the Full Bench of the Gauteng Division, Pretoria in *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP) as affirmed by the Supreme Court of Appeal in *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA)—the so-called ‘spy-tape’ saga—are the latest illustrations of this approach.

Keywords: Prosecutorial discretion; immunity from judicial oversight; judicial review of prosecutorial discretion; legality and rationality; discretion to prosecute, discontinue or to continue prosecution, or withdraw prosecution

Introduction

Prosecutorial discretion represents the fact that in some common-law jurisdictions such as the United States of America, a prosecution attorney has almost absolute and unreviewable powers in the performance of prosecutorial duties. In other words, a prosecuting attorney has power on various matters including those relating to choosing whether to bring criminal charges, deciding the nature of the charges, plea bargaining and sentence recommendation.¹ Even at the risk of repetition,² in this context it is necessary to state that the question whether prosecutorial discretion to institute, or not to institute, to continue or discontinue prosecution is subject to judicial review is one that has troubled common-law courts over the years. In South Africa, the constitutional requirement³ that the prosecuting authority be independent, and should exercise its functions without fear, favour or prejudice,⁴ makes the courts hesitant to interfere with prosecutorial discretions.⁵ Accordingly, the court will only interfere where the prosecutor has acted patently illegally or irrationally⁶ or where he or she acts *mala fide*⁷ or for ulterior purposes.⁸ Therefore, the prosecutor is, like every public functionary, subject to the tests of legality and rationality.⁹ However, the Canadian approach is more attuned to the general common-law approach which, as shown in the *Sharma* jurisprudence,¹⁰ would review prosecutorial discretion only where it constitutes an

-
- 1 See USLEGAL.COM, 'Prosecutorial Discretion Law and Legal Definition' <definitions.uslegal.com/p/prosecutorial-discretion> accessed 15 October 2016.
 - 2 See Chuks Okpaluba 'Judicial Review of Executive Power: Legality, Rationality and Reasonableness (2)' (2015) 30(2) SAPL 380 para 5.6.
 - 3 Section 179(4) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
 - 4 Section 179(4) of the Constitution. The SAPS Act 1995 was declared unconstitutional in *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 251 for establishing the Directorate of Priority Crime Investigation, a crime busting body, without securing a degree of adequate independence for it from political interference.
 - 5 See Pieter du Toit, 'Recent Cases, Criminal Procedure' (2015) 28 SACJ 85 at 87.
 - 6 *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* 1994 (1) SA 387 (C); *Booyesen v Acting NDPP* 2014 (2) SACR 556 (KZD) paras 34–36.
 - 7 *Mitchell v Attorney General, Natal* 1992 (2) SACR 68 (N).
 - 8 *NDPP v Zuma* 2009 (2) SA 277 (SCA) para 38. Although the recent decision of the SCA in *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) paras 41–43 and 48 did not concern the exercise of prosecutorial discretion, it illustrates the exercise of statutory powers for ulterior purposes. The MEC had sacked members of the Gambling Board and it was clear that she had done so because they had refused to accommodate a company, the African Romance, at the behest of the MEC. It was held that in doing so, she had failed to consider the confines of the statutory provisions on which she relied or the consequences on the fiscus and on transparent and accountable governance. In other words, she had acted beyond her legal powers and contrary to the principle of legality hence her decision to dissolve the Board was set aside.
 - 9 *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) paras 78–81; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 48–49. See generally, Chuks Okpaluba, 'Judicial Review of Executive Power: Legality, Rationality and Reasonableness (Part 1)' (2015) 30(1) SAPL 122 para 3.
 - 10 See *Sharma v DDPP Trinidad and Tobago* [2007] 1 WLR 780 (PC).

abuse of process or where it amounts to malicious prosecution or misfeasance in public office.

This article sets out to explore the similarities and the divergences in the approaches of the Canadian and South African courts on the issue of prosecutorial discretion and judicial review, and to probe the extent to which the universal common-law non-reviewability approach is practised in each jurisdiction. Although state liability is not the subject of the present discussion,¹¹ a clear understanding of the state's responsibility in respect of its investigating and prosecuting powers depends on the limits of judicial review of the prosecuting powers of the state. Incidentally, initial research on state liability led to the present investigation—the original idea being to introduce that subject by demonstrating how the courts treat review of prosecutorial discretion.

In conducting the research, it became clear that prosecutorial independence and impartiality could stand as a separate article, and would, due to spatial constraints, not be dealt with in this article. This article therefore, deals with the general common-law attitude towards judicial reviewability of prosecutorial discretion, using Canada and South Africa as case studies. While the Canadian experience tends towards the traditional common-law approach, South Africa provides what could be described as a completely different approach. In addition to discussing the judgments elucidating such issues as the distinction between prosecutorial discretion and 'tactics and conduct' as well as distinguishing prosecutorial discretion from constitutional obligations, there are other principles distilled from the Court Martial Appeal judgment in *R v Wehmeier*,¹² on prosecutorial discretion and abuse of process which are discussed here. In South Africa, the principle that prosecutorial discretion is not an exception to the general rule and that the performance of all public functions is subject to judicial review, is illustrated by the decision of the Full Bench of the Gauteng High Court in *Democratic Alliance v Acting National Director of Public Prosecutions*¹³ and the Supreme Court of Appeal in *Zuma v Democratic Alliance*¹⁴ which concerned whether the court could, upon judicial review, order that the prosecutorial decision to discontinue prosecution be reinstated, albeit ten years later.

11 See Chuks Okpaluba, 'Prosecutorial Negligence and Negligent Police Investigation: An Analysis of Recent Canadian and South African Decisions (1)' (2018) 32(1) *Speculum Juris* 34; 'Prosecutorial Negligence and Negligent Police Investigation: An Analysis of Recent Canadian and South African Decisions (2)' (2018) 32(1) *Speculum Juris* 154; 'Prosecutorial Negligence and Negligent Police Investigation: An Analysis of Recent Canadian and South African Decisions (3)' (2019) 33(1) *Speculum Juris* 69.

12 2014 CMAC 5 (15 April 2014).

13 2016 (2) SACR 1 (GP).

14 2018 (1) SA 200 (SCA).

The Canadian Experience¹⁵

The Canadian Supreme Court Reports (SCR) reveal that the exercise of prosecutorial discretion and the principle of independence that it involves have been the subject of a series of decisions by the Supreme Court in the last two-and-a-half decades, starting with *Nelles v Ontario*¹⁶ through *Miazga v Kvello Estate*¹⁷ and winding down more recently to *Hinse v Canada (Attorney General)*,¹⁸ *Henry v British Columbia (Attorney General)*,¹⁹ and *R v Cawthorne*.²⁰ It was not only established in these cases that a prosecutor, whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function, has a constitutional obligation to act independently of partisan concerns and other improper motives and that prosecutorial discretion is firmly regarded as a necessary adjunct of the Canadian criminal justice system.²¹ Indeed, the court in *R v Beare*²² held that a system which did not confer a broad discretion on law enforcement and prosecutorial authorities would be unworkable. La Forest J warned that:

Discretion is an essential feature of the criminal law system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.²³

Again, in *Miazga v Kvello Estate*²⁴ the Supreme Court of Canada warned that the review of M's conduct of the prosecution exemplified the very kind of second-guessing of prosecutorial discretion that should be avoided. It emphasised the fundamental

15 See also Andrew Flavelle Martin, 'The Immunity of the Attorney General to Law Society Discipline' (2016) 94(2) Canadian Bar Review 413; Dennis Baker, 'The Provincial Power to (Not) Prosecute Criminal Code Offences' (2017) 48(2) Ottawa LR 419; Alice Woolley, 'Receiving the Standard Conception of Prosecutor's Role' (2017) 95(3) Canadian Bar Review 795; Palma Paciocco, 'Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining' (2018) 63(1) McGill LJ 45.

16 1989] 2 SCR 170. See also *R v TV* [1991] 1 SCR 749; *R v Cook* 1997 CanLII 392 (SCC); *Krieger v Law Society of Alberta* [2002] 3 SCR 372; *R v Nixon* [2011] 2 SCR 566; *R v Anderson* 2015 SCC 35 (SCC).

17 [2009] SCR 339 (SCC).

44 2015 SCC 35 (*Hinse*).

19 (2015) 383 DLR (4th) 383 (SCC).

20 2016 SCC 32.

21 [1988] 2 SCR 387 at 410; *R v T (V)* [1992] 1 SCR 749 at 758–762; *R v Cook* [1997] 1 SCR 1113 para 19.

22 [1988] 2 SCR 387.

23 *Beare* (n 21) 410. See also *Smyth v The Queen* [1971] SCR 680 at 686; *R v Lyons* [1987] 2 SCR 309 at 348.

24 *Miazga* (n 17).

importance of prosecutorial discretion and held that it rested ‘not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as “ministers of justice”.’²⁵ In *Sriskandarajah v United States of America*,²⁶ the Supreme Court of Canada held that prosecutorial discretion does not only correspond with the constitutional principles of fundamental justice, but is also a basic tenet of the criminal justice system.²⁷

Prior to the foregoing statements, the Supreme Court had made certain important rulings on this subject in *Krieger v Law Society of Alberta*.²⁸ It had described ‘prosecutorial discretion’ as a term of art which does not simply refer to any discretionary decision made by the Crown but to the use of those powers that constitute ‘the core of the Attorney General’s office and which are protected from influence of improper political and other vitiating factors by the principle of independence.’²⁹ In this case, the court was dealing with a prosecutor who faced disciplinary action by the Law Society, owing to his unprofessional conduct by withholding vital information from the defence and had relied on the non-reviewability of prosecutorial discretion to contend that the court lacked jurisdiction over his conduct in his capacity as a prosecutor. The Supreme Court of Canada held that

because Crown prosecutors must be members of the Law Society, they are subject to the Law Society’s code of professional conduct, and all conduct that is protected by the doctrine of prosecutorial discretion is subject to the conduct review process. As the disclosure of relevant evidence is not a matter of prosecutorial discretion but rather a legal duty, the Law Society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information, notwithstanding that the Attorney General had reviewed it from the perspective of an employer. A clear distinction exists between prosecutorial discretion and professional conduct, and only the latter can be regulated by the Law Society.³⁰

The Attorney General’s office is empowered to discipline a prosecutor for failing to meet the office’s standards, but that is a different function than that of disciplining the same prosecutor in his or her capacity as a member of the Law Society. The Law Society has jurisdiction to review a prosecutor’s conduct to determine whether he or she acted

25 *ibid* para 47.

26 [2012] 3 SCR 609 para 27.

27 See also per Moldaver J, *Anderson* (n 16) para 37.

28 *Krieger* (n 16) 372.

29 *ibid* para 43.

30 *ibid* paras 50–52.

dishonestly or in bad faith in failing to disclose relevant information to an accused in a timely manner.

Iacobucci and Major JJ laid down three principles governing prosecutorial discretion, namely: first, that prosecutorial discretion does not simply refer to any discretionary decision made by a Crown prosecutor, but refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.³¹ Second, the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to prosecute a charge laid by the police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in sections 579 and 579.1 of the Criminal Code 1985; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether;³² and (e) the discretion to take control of a private prosecution.³³ 'While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.'³⁴ Third, the various components of prosecutorial discretion have some elements in common, namely the ultimate decision as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. In effect, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's involvement. Decisions that do not address the nature and extent of the prosecution, such as decisions that are governed by a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.³⁵

Core Prosecutorial Decision and Other Exercise of Prosecutorial Discretion

In *R v Gill*,³⁶ Doherty JA addressed the distinction between core prosecutorial decisions and other exercises of prosecutorial discretion. According to the Justice of Appeal, the

31 *Krieger* (n 16) para 43.

32 *R v Osborne* (1975) 25 CCC (2d) 405 (NBCA).

33 *R v Osiowy* (1989) 50 CCC (3d) 189 (Sask.CA).

34 *Krieger* (n 16) para 46.

35 *ibid* para 47. It was held in *R v Felderhof* 2003 CanLII 37346 ONCA para 54, that the trial judge's power to manage the trial, including the power to review the order in which certain evidence may be called, properly falls within the area of the prosecutor's 'tactics and conduct' and thus does not implicate prosecutorial discretion that is reviewable only on the standard of abuse of process, bad faith or improper purpose. The appellant's separation of powers rationale does not stand in the way of recognising a trial management power.

36 2012 ONCA 607 (CanLII) paras 51–54.

distinction between the two concepts is entrenched in Canadian jurisprudence.³⁷ As was explained in *Krieger*, prosecutorial decisions at the core of prosecutorial authority are those involving the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what prosecution ought to be for. Prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Prosecutorial decisions that do not lie at the core of prosecutorial authority are said to involve 'tactics or conduct before the court'.³⁸ The distinction between core prosecutorial powers and other prosecutorial decisions lies in the nature of the decision being made. Otherwise, 'decisions that are made in the course of an ongoing proceeding and address the kinds of tactical issues that routinely are in litigation are not part of the core prosecutorial discretion.'³⁹ To emphasise the point, as gathered in *Anderson*,⁴⁰ Romilly J held that the decision to prosecute as in the case before court in *R v Brown*⁴¹ was clearly an exercise of core prosecutorial discretion.

Between Prosecutorial Discretion and 'Tactics and Conduct'

Since *Krieger*, the courts have found it difficult to find a distinction between prosecutorial discretion and tactics and conduct. The Supreme Court thus took the opportunity presented by *R v Anderson*,⁴² which raised the issue of whether the decision to seek mandatory minimum sentence is a matter of core prosecutorial discretion. Like the court in *Krieger*, the Supreme Court in *R v Anderson* reiterated that prosecutorial discretion 'is an expansive term that covers all decisions regarding the nature and extent of the prosecution and Attorney General's participation in it.'⁴³ Although the court held that it was impossible to create an exhaustive list of decisions that fall within the nature and extent of a prosecution, it suggested additional examples to those proffered in *Krieger* to include the decision to: (a) repudiate a plea agreement;⁴⁴ (b) pursue a dangerous offender application; (c) prefer a direct indictment; (d) charge multiple offences; (e) negotiate a plea; (f) proceed summarily or by indictment; and (g) to initiate an appeal.⁴⁵

It was held that prosecutorial discretion is afforded considerable deference and it must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle, based on the doctrine of separation of powers while, whereas tactics and conduct before court are governed by the inherent jurisdiction of the court to control

37 *Krieger* (n 16) paras 45–47; *Nixon* (n 16) 566 paras 18–21; *Miazga* (n 17) paras 45–47; *R v JSR* 2012 ONCA 568 paras 118–134.

38 *Krieger* (n 16) para 47.

39 *R v Brown* 2014 BCSC 1689 (CanLII) 4 September 2014) para 21.

40 [2014] 2 SCR 167 paras 37 and 40.

41 *Brown* (n 40) para 22.

42 [2014] 2 SCR 167 para 41.

43 *Anderson* (n 16) para 44.

44 *Nixon* (n 16) 566.

45 *Anderson* (n 16) para 44.

its own processes.⁴⁶ A high degree of deference is accorded tactical decisions of counsel, in contrast to inappropriate behaviour in the courtroom. Prosecutorial discretion is not immune from all judicial oversight since it is reviewable for abuse of process.⁴⁷ The court further held⁴⁸ that the jurisprudence pertaining to review of prosecutorial discretion ‘has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process’ such as: ‘flagrant impropriety’;⁴⁹ where the conduct ‘undermines the integrity of the judicial process’ or results in the unfairness of the trial.⁵⁰ ‘Improper motives’ and ‘bad faith’ were also referred to.⁵¹ It is important to note that abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Thus, Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard.⁵²

Repudiating a Plea Agreement

Unlike malicious prosecution, abuse of process is not necessarily a prosecutor’s misdeed although it may involve prosecution where it has been instituted for a purpose or to affect an object beyond that which the legal process offers. In this context the court sets out to prevent the use of its process resulting in oppression even if the party behind the proceedings had a *prima facie* case or must be assumed to have a *prima facie* case.⁵³ In this regard, the Supreme Court of Canada case of *R v Nixon*⁵⁴ refers, which raises the problem of a prosecutor’s discretion to prosecute an accused charged with dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges of impaired driving, after rescinding a plea agreement previously entered into with the accused. A senior official of the Criminal Justice Division instructed the Crown to withdraw the plea agreement and proceed to trial as he considered that the plea to careless driving was contrary to the interests of justice under the circumstances and would bring the administration of justice into disrepute. The accused brought an

46 *ibid* para 46.

47 *ibid* para 48; *Nixon* (n 16) para 31; *Miazga* (n 17) para 46; *Krieger* (n 16) para 32.

48 *Anderson* (n 16) para 49.

49 *Krieger* (n 16) para 49.

50 *Nixon* (n 16) para 64.

51 *ibid* para 68.

52 *Anderson* (n 16) para 50.

53 *Williams v Spautz* (1992) 174 CLR 509 (HCA) where the respondent had commenced over thirty proceedings, the majority of which were, criminal prosecutions, against persons who occupied positions of authority or who played a role in the events leading to his dismissal as a senior lecturer in the Department of Commerce at the University of Newcastle. The majority of the High Court (Dean and Gaudron JJ dissenting) held that the respondent threatened to use the proceedings for an improper purpose and that his commencement and maintenance of the proceedings were, in pursuance of that purpose, undertaken predominantly to that end. Though regular in form, each of the action was an abuse of process and was stayed.

54 *Nixon* (n 16).

application under section 7 of the Canadian Charter of Rights and Freedoms alleging abuse of process and required the Crown to complete the plea agreement. In the Supreme Court of Canada, the question was whether the trial judge erred in concluding that the Crown's repudiation of a plea agreement was an abuse of the appellant's rights under section 7 of the Charter. In a unanimous judgment delivered by Charron J, it was held that the Crown's decision to withdraw from the plea agreement and to continue the prosecution, clearly constituted an act of prosecutorial discretion subject to the principles of review, solely on the ground of abuse of process as laid down in *Krieger v Law Society of Alberta*.⁵⁵

Since prosecutorial discretion is not concerned with the decision to initiate the proceedings, nor does it terminate with a plea agreement, the Crown may be required to make further decisions about whether the prosecution should be continued, and if so, in respect of what charges.⁵⁶ Two categories of abuse of process under section 7 of the Charter have been identified as follows:⁵⁷ (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. While section 24(1) of the Charter allows for a wide range of remedies, this does not mean that abuse of process can be demonstrated by lesser harm, either to the accused's fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.⁵⁸

The repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process.⁵⁹ The more difficult question in this appeal is how the initial exercise of prosecutorial discretion—Crown counsel's offer to resolve the matter on the basis of a plea to a lesser charge—should figure in the analysis regarding abuse of process.⁶⁰ A plea agreement should not be regarded as a contractual undertaking. Vitiating factors, such as mistake, misrepresentation or fraud, which usually inform a private party's right to resile from a plea bargain, do not fully capture the public interest considerations which are at play.⁶¹ However, the analogy can usefully underscore the utmost importance of honouring the agreement. The situations in which the Crown can properly repudiate a plea agreement are, and must remain, very rare.⁶² Moreover, the reasonably defensible test applied by the application judge to the

55 *Krieger* (n 16) paras 43, 46–47.

56 *Nixon* (n 16) para 30.

57 See *R v O'Connor* [1995] 4 SCR 411 para 73.

58 *Nixon* (n 16) para 38.

59 *Nixon* (n 16) para 64. See also *Canada (Minister of Citizenship & Immigration) v Tobiass* [1997] 3 SCR 391; *R v Regan* [2002] 1 SCR 297.

60 *Nixon* (n 16) para 32.

61 *ibid* para 44.

62 *ibid* para 63.

decision of the Crown Counsel to enter into a plea agreement is not the appropriate measure to determine whether there is an abuse of process. Indeed, it is the circumstances surrounding the repudiation of a plea agreement which should be reviewed to determine whether that decision amounts to an abuse of process. Reviewing for ‘reasonableness’, a decision made in the exercise of prosecutorial discretion, runs contrary to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions as well as the principles set out in *Krieger v Law Society of Alberta*.

Given that acts of prosecutorial discretion are generally beyond the reach of the court, there is good reason to impose a threshold burden on the applicant who alleges abuse of process.⁶³ A court should not embark on an inquiry into the reasons behind the exercise of prosecutorial discretion without a proper evidentiary foundation. However, evidence that a plea agreement has been entered into and subsequently reneged upon by the Crown meets the requisite threshold.⁶⁴ Further, to the extent that the Crown is the only party privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. The ultimate burden of proof of abuse of process, however, rests upon the applicant and the test is a stringent one.⁶⁵ In this case, the Crown’s repudiation could not have been considered so unfair or oppressive to the accused, or so tainted by bad faith or improper motive, to allow the Crown to proceed on the dangerous driving charges. This would tarnish the integrity of the judicial system and thus constitute an abuse of process. The Acting Assistant Deputy Minister had, in good faith, determined that Crown counsel’s assessment of the strength of the evidence was erroneous and, on that basis and having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. This can hardly be regarded as evidence of misconduct.⁶⁶ Finally, the accused was returned to the position she was in at the conclusion of the preliminary hearing before the plea agreement was entered into and thus suffered no prejudice as a result of the repudiation.⁶⁷

Prosecutorial Discretion and Abuse of Process

The use of abuse of process in the present context need to be examined. It is an integral part of this article since the police prosecutor and the state or Crown prosecutor often encounter allegations of abuse of process in their prosecuting duties. ‘Process’ in a court context signifies ‘a series of actions’ or ‘motions’, ‘mode, method or operation whereby

63 *ibid* para 62.

64 *ibid* para 65.

65 *Nixon* (n 16) para 63.

66 *ibid* paras 59, 65, 66, 68 and 69.

67 *ibid* para 70.

a result is produced,’⁶⁸ whereas the meaning of the word ‘abuse’ encountered in everyday usage is one not that easily understood⁶⁹ in the judicial process context, and differs from that in colloquial usage. Meanwhile, the two senses in which the word ‘abuse’ is frequently used are informative. In one sense, ‘abuse’ denotes ‘everything that is contrary to good order established by usage. It means a departure from reasonable use; immoderate or improper use; physical or mental maltreatment; misuse; deception.’⁷⁰ In another sense, it connotes making excessive use of a thing, or to employ it in a manner contrary to the natural or legal rules for its use; to make an extravagant or excessive use, as to abuse one’s authority.’⁷¹ According to *Black’s Law Dictionary*, the gist of an action for abuse of process is improper use or perversion of process after it has been issued.⁷² Similarly, a malicious abuse of legal process occurs where the party employs it for some unlawful object, not the purpose for which it was intended by law to effect; in other words, a pervasion of it.⁷³ An example of this would be the purpose of a prosecution for the issuing of a cheque without funds to cover the collection of a debt; the prosecution is an abuse of the criminal process. Regular and legitimate use of process, although with mala fide intention, is not a malicious abuse of process.⁷⁴ The fundamental elements of a tort are ulterior purpose and a willful use of improper process during the proceeding. When contrasted with an action for malicious prosecution of a faulty issuance of process, an action for abuse of process rests upon improper use of regularly issued process.⁷⁵

‘Abuse of process of court’ is a broad expression covering many issues⁷⁶ and can arise in ‘very varied’ circumstances.⁷⁷ For instance, in delivering the majority judgment of the court in *Batistatos v Roads and Traffic Authority of New South Wales*,⁷⁸ Gleeson CJ,

68 *Black’s Law Dictionary* (6th edn, Thomson Reuters 1990) 1205.

69 Abuse of power is also used in relation to improper performance of police functions which may manifest in criminal law especially raising the issue of admissibility of evidence obtained in circumstances that amount to abuse of power—see eg *The State v Marquis* [2006] TTHC 41; or as a common-law action for misfeasance in public office—*Sanders v Snell* (1998) 196 CLR 329, *Rush v Commissioner of Police* (2006) 150 FCR 165, 229 ALR 383, *L (a child) v Reading Borough Council* [2001] 1 WLR 1575; or give rise to a constitutional cause of action—*Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328, [2005] 2 WLR 1324 (PC) (‘shameful misuse of coercive power’ and ‘some quite appalling misbehaviour by a police officer’), *Merson v Cartwright* [2005] UKPC 38 (PC), *Talikota v Attorney General* [2009] UKPC (PC), *Sookhai v Attorney General of Trinidad and Tobago* [2007] TTHC 47 (‘a gross abuse of power’).

70 *Black’s Law Dictionary* (n 68) 10.

71 *ibid* 11.

72 *Public Drug Co v Breyer Ice Cream Co* 347 Pa 346 A 2d 413 at 415.

73 *ibid*, citing *500 West 174 St v Vasquez* 67 Misc.2d 993, 325 NYS 2d 256 at 258.

74 *Priest v Union Agency* 174 Tenn 304, 125 SW2d 142 at 143.

75 *Black’s Law Dictionary* (n 68) 11; *Lobel v Trade Bank of New York* 132 Misc. 643, 229 NYS 778 at 781.

76 Griffith CJ in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 55.

77 Per Lord Diplock, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536.

78 Per Gleeson CJ, Gummow, Hayne and Crennan JJ (2006) 227 ALR 425 para 9.

Gummow, Hayne and Crennan JJ observed that ‘what amounts to abuse of process is insusceptible of a formulation comprising closed categories’ while ‘development continues’. An aspect of the inherent jurisdiction or power of a superior court is to protect its integrity and processes from abuse (such as by proceeding without reasonable grounds, so as to be vexatious and harassing).⁷⁹ It was held in *Cardile v LED Builders Pty Ltd*⁸⁰ that the integrity of those processes extends to preserving the efficacy of the execution which would be against the actual or prospective judgment debtor. In effect, the protection of the administration of justice, which is what abuse of process is concerned with, may extend to asset preservation orders against third parties to the principal litigation. Again, in *Ridgeway v The Queen*,⁸¹ Gaudron J held that ‘[t]he powers to prevent an abuse of process have traditionally been seen as including a power to stay proceedings instituted for an improper purpose as well as proceedings that are “frivolous, vexatious or oppressive”’.⁸² But, that notwithstanding, there is no precise notion of what vexatious or oppressive constitute, or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned against, laying down hard and fast definitions in that regard.⁸³ Nor could abuse of process be restricted to ‘defined and closed categories’ because notions of justice and injustice, as well as other considerations that have a bearing on public confidence in the administration of justice, must reflect contemporary values and also take into account the circumstances of the case.⁸⁴ That is not to say that the concept of ‘abuse of process’ is broad, or even meaningless⁸⁵ as it extends to proceedings that are ‘seriously and unfairly burdensome,

79 Per Lord Blackburn, *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas. 210 at 220–221.

80 (1999) 198 CLR 380 at 391 para 25.

81 (1995) 184 CLR 19 at 74–75.

82 *Williams v Spautz* (n 53) 509.

83 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 242–243, 246–247.

84 *Hamilton v Oades* (1989) 166 CLR 486 at 502; *Dietrich v The Queen* (1992) 174 CLR 509 at 526–530, 532–537, 553–556.

85 As much as the courts in Nigeria recognise that abuse of court process is a difficult term to define, they regard it as referring to an act done in bad faith by a party against the other to outsmart that other. It is an abuse of process where a proceeding is wanting in *bona fides* and is frivolous, vexatious and oppressive. It can also mean abuse of legal procedure or improper use of legal process—per Oputa JSC, *Ahamefuna v Olawunmi* (1988) 2 NWLR (75) 156 at 177. And, in *Kotoye v Saraki* (1991) 8 NWLR (211) 638 at 646–647, Tobi JCA spoke of abuse of process as having some element of *mala fides* on the part of the party initiating the court process. According to him, the court process can be said to have been abused where ‘there is no iota of law supporting it’ such as where it is ‘premised or founded on frivolity or recklessness.’ In *Ikonne v COP* (1986) 4 NWLR (36) 473, Aniagolu JSC held that a warrant of arrest issued by a judge without a valid legal reason would amount to an abuse of legal process as much as it is an abuse of judicial authority. It was also held in *Okafor v Attorney General of Anambra State* (1991) 3 NWLR (200) 659 that it is an abuse of the process of the court where a party improperly uses the judicial process to the irritation and annoyance of his opponent, such as instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues. Added to this was the institution of different actions between the same parties, simultaneously in different courts even though on different grounds. For instance, Toby JSC, with the concurrence of the other four judges of the Supreme Court of Nigeria, held in *Agwasim v Ojichie*

prejudicial or damaging⁸⁶ or ‘productive of serious and unjustified trouble and harassment.’⁸⁷

In addition to the Supreme Court of Canada cases of *Krieger* and *Nixon*, there is the Court Martial Appeal Court judgment in *R v Wehmeier*,⁸⁸ where the question of abuse of process in relation to misconduct of a prosecutor in the performance of prosecutorial function was deliberated upon. Two main issues were raised at the Court Martial Appeal Court (CMAC) in that case. The first, was whether the Chief Military Judge erred in concluding that the Director of Military Prosecutions’ (DMP) conduct amounted to an abuse of process regarding the integrity and reputation of the military justice system. Secondly, were the proceedings against the respondent before the Standing Court Martial a breach of his rights not to be deprived of liberty except in accordance with the principles of fundamental justice in terms of section 7 of the Charter? In dismissing the appeal, Blanchard CJ, Pelletier and Trudel JJA laid down three pertinent principles along the lines discussed below.

Prosecutorial Discretion as a Fundamental Principle of Justice

It was held that prosecutorial discretion is a fundamental principle of the Canadian criminal justice system and that it is viewed as a constitutional principle. Prosecutors must be able to exercise their authority to initiate, continue or cease prosecutions independently. The law respects this discretion by directing that courts should not interfere with prosecutorial discretion, unless it is exercised in good faith and in the interests of justice. The limited oversight of prosecutorial discretion is grounded in the principles of separation of powers and the rule of law under the Constitution and the court’s role not to supervise parties’ decision-making processes.⁸⁹ Not every discretionary decision falls within the scope of prosecutorial discretion. What the courts attempt to protect are ‘the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what prosecution ought to be for.’⁹⁰ Once a decision is found to be within this scope, as opposed to having been influenced by tactics or conduct before the court, ‘the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for malicious prosecution.’⁹¹ The CMAC held that

[2004] All FWLR 1600 at 1609, that the appellants’ filing of an appeal to the Supreme Court against the Court of Appeal’s ruling dismissing their appeal for lack of diligent prosecution and the simultaneous filing of a motion on notice before the Court of Appeal for an order setting aside the dismissal of the appeal, is an abuse of the judicial process. See also *ARC v JPD Construction (Nig) Ltd* [2003] FWLR (153) 251; *Idoko v Ogbeikwu* [2003] FWLR (149) 1530 (CA).

86 *Oceanic Sun* (n 83) 247 per Dean J. See also *Hamilton* (n 84) 502.

87 Per Gleeson CJ, Gummow, Hayne and Heydon JJ in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at 109–110 paras 74–75.

88 *Wehmeier* (n 12).

89 *Wehmeier* (n 12) paras 26–27; *R v Power* [1994] 1 SCR 601 at 621; *Krieger* (n 16) para 32.

90 *Wehmeier* (n 12) para 29; *Krieger* (n 16) para 47; *Nixon* (n 16) para 21.

91 *Wehmeier* (n 12) para 29; *Krieger* (n 16) para 49; *Nixon* (n 16) para 30. See also *Nelles* (n 16) 170.

although the military justice system may possess its own system of prosecution, defence and tribunals, the role played by the DMP is similar to that exercised by the Attorney General. While there are differences between the two offices,⁹² they do not justify the conclusion that a different scope of prosecutorial discretion applies to the DMP. Thus, the principles articulated in the jurisprudence with regard to the nature of the role of the prosecutor, prosecutorial discretion and the circumstances, which may warrant a review of a prosecutorial decision, find application to the DMP and the exercise of prosecutorial discretion by the DMP.⁹³

Prosecutorial Discretion not Totally Immune from Judicial Review

As much as prosecutorial discretion is subject to a high level of deference, and the prosecutor has wide-ranging discretion, acts of prosecutorial discretion are not totally immune from judicial review, as they are subject to the abuse of process doctrine.⁹⁴ The definition and application of the doctrine are an exercise in balancing societal and individual concerns having regard for the two categories of abuse of process which would be caught by section 7 of the Charter.⁹⁵ The court referred to what Moldaver J had to say of the second of the two categories known as the residual category when in *R v Babos*,⁹⁶ the Supreme Court judge observed that:

By contrast, when the residual category is invoked, the question is whether the state had engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones conduct that offends society’s sense of fair play and decency. This harms the integrity of the justice system.⁹⁷

The CMAC then held that the abuse of process is a safeguard meant to protect against conduct affecting the fairness of the trial and conduct undermining the integrity of the justice system. Cases of this nature are rare and courts must therefore ensure that this high threshold has been met before ‘second-guessing’ the motives and reasons underlying the prosecutorial decision-making process.⁹⁸

92 *R v JSKT* 2008 CMAC 3 (CanLII) para 98.

93 *Wehmeier* (n 12) para 31.

94 *Nixon* (n 16) paras 31 and 64.

95 *O’Connor* (n 57) para 73; *Nixon* (n 16) paras 36 and 38.

96 2014 SCC 16 (CanLII).

97 *ibid* para 35.

98 *Wehmeier* (n 12) para 35; *Miazga* (n 17) paras 6, 45–48.

The Absence of a Threshold Test

In conclusion, the court held that the trial Chief Military Judge correctly articulated the applicable legal test in that, in the absence of a threshold determination, courts should not undertake a review of prosecutorial discretion. The decisions of the DMP to prefer charges and the decision to continue with a Standing Court Martial were his alone to make and were within the core of prosecutorial discretion. These decisions relate to whether a prosecution should be brought and continued and what charges the prosecution ought to be for. As such, they should not be interfered with in the absence of sufficient evidence to question that discretion.⁹⁹ There was no evidence before court to support a finding of abuse of process, not even the DMP's refusal to transfer the case to civilian authorities. Furthermore, there was no freestanding principle of fundamental justice requiring the Crown to justify the exercise of its discretion to the trial court,¹⁰⁰ neither did the DMP have a constitutional obligation to provide reasons for his or her decision.¹⁰¹ It was, however, held that the records before the CMAC, the DMP failed to address the need for prosecution in the military as opposed to the civilian justice system and that, in the absence of such a justification, the court is entitled to conclude that the effects of prosecuting the respondent in the military justice system were disproportionate. As a result, the prosecution is a breach of the respondent's right not to be deprived of his liberty except in accordance with the principles of fundamental justice contrary to section 7 of the Charter.¹⁰² Although each case rests on its own facts:

we would say however that where a civilian makes a section 7 argument based on the loss of procedural rights before the military courts, the onus shifts to the prosecution to justify the proceeding before the military courts as opposed to the civilian criminal courts. It will then fall to the court to decide if the State interest in proceeding in the military courts is proportionate to the civilian's loss of procedural rights.¹⁰³

Distinguishing Prosecutorial Discretion from Constitutional Obligations

As summarised in its judgment in *Anderson*,¹⁰⁴ the Supreme Court has held that a distinction must be made between prosecutorial discretion applied to a wide range of prosecutorial decision-making, and constitutional obligations. Furthermore, a distinction must be made between prosecutorial discretion and the constitutional obligations of the Crown in line with *Krieger* where the prosecutor's duty to disclose relevant evidence to the accused was the issue. In that case, it was held that while the Crown retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not a matter of prosecutorial discretion but, rather, a prosecutorial

99 *Wehmeier* (n 12) para 36; *Krieger* (n 16) para 47.

100 *R v Gill* 2012 ONCA 607 para 75.

101 *Wehmeier* (n 12) paras 41–43; *ibid* para 77.

102 *Wehmeier* (n 12) para 61.

103 *ibid* para 62.

104 *Anderson* (n 16) para 45.

duty.¹⁰⁵ Moldaver J, delivering the judgment of the court in *Anderson*, made it clear that the Crown possesses no discretion to breach the Charter rights of an accused person, ie. prosecutorial discretion ‘provides no shield to a Crown prosecutor who has failed to fulfil his or her constitutional obligations such as the duty to provide proper disclosure to the defence.’¹⁰⁶ These decisions ultimately formed the basis upon which prosecutorial liability was canvassed in *Henry v British Columbia (Attorney General)*.¹⁰⁷ In light of the foregoing obstacles in an action for damages against the prosecutor in the exercise of prosecutorial discretions, while the plaintiff in *Henry v British Columbia*, capitalising on the clues garnered from the dicta in *Krieger v Law Society of Alberta* and *R v Anderson*, sought to approach the matter by way of Charter damages in terms of section 24(1) of the Constitution of Canada 1982. Another important factor that might have encouraged the plaintiff in taking that line of action is the judgment in *Vancouver (City) v Ward*¹⁰⁸ where the Supreme Court not only extensively deliberated upon the question of Charter damages but also cleared the way for such actions to be brought against public authorities in Canada.

The South African Approach¹⁰⁹

In South Africa, the prosecutor enjoys a special relationship with the court, with the paramount duty of assisting it in ascertaining the truth in the interest of justice.¹¹⁰ The police investigator and the prosecutor collaborate and, ideally the investigating officers should be assisting in the presentation of the evidence to court by assisting the prosecution. That this collaboration did not happen in *S v Sebofi*¹¹¹ was brought out in the judgment of Sutherland J (Opperman AJ concurring) where the judge remarked that versions were often disclosed for the first time during cross-examination of state witnesses, or aspects of a witness’s evidence required amplification, qualification or simple explanation. These matters needed to be followed up and, if necessary, postponements sought to investigate the correctness of the facts in question. A matter as serious as a rape charge, which carries a heavy sentence, fell into the category of matters in which an active role for the investigating officer ought to be mandatory in terms of standard prosecutorial and police procedures. As much as the court held that a prosecutor could not present a case by simply stating random facts, so too, any victims of rape, as a class of vulnerable people in society ought to have a reasonable expectation that their cases were taken seriously enough to be investigated properly and tried at a

105 *Krieger* (n 16) para 54.

106 *Anderson* (n 16) para 45.

107 *Henry* (n 19).

108 [2010] 2 SCR 28 (SCC).

109 See also Lindiwe Maqutu, ‘When the Judiciary Flouts Separation of Powers: Attenuating the Credibility of the National Prosecuting Authority’ (2015) 18(7) PELJ 55; Pieter du Toit and Gerrit Ferreira, ‘Reasons for Prosecutorial Decisions’ (2015) 18(5) PELJ 64.

110 See eg *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) paras 72–74.

111 2015 (2) SACR 179 (GJ).

standard not enabling the guilty to get off free because of superficial attention to detail by those who were responsible to protect them.¹¹² Meanwhile, a number of well-settled principles could be fleshed out from decided cases to illustrate the role the prosecutor plays in the criminal justice system in South Africa. However, two of these principles, namely: that the prosecutor is an officer of the court; and that the prosecutor is under a duty to function independently and in the interests of the public, are omitted in the present discussion since they are discussed in the context of prosecutorial independence and impartiality.

Duty to Act Fairly and Responsibly

The first and primary rule regulating prosecutorial duty or function is that it is not the prosecutor's duty to secure a conviction at all costs¹¹³ or to defend convictions once obtained.¹¹⁴ Rather, the prosecutor is expected to act fairly and responsibly towards the accused and to place before court all relevant and admissible material.¹¹⁵ The duty of a prosecutor is to present all available legal proof of the facts by making the evidence available to the accused's legal representative; it is not the prosecutor's duty to put the information before the court.¹¹⁶ For instance, in *S v Macrae*,¹¹⁷ counsel for the state conceded early in the appeal process that the appellants did not have a fair trial but did not do so at the outset nor bring it to the attention of the High Court. Instead, the office of the DPP had not only pursued the prosecution but had also defended the conviction in the High Court and resisted further appeal to the SCA being granted. Wallis JA held that: 'where an appeal is being argued one expects the prosecutor to do so in an objective

112 *ibid* paras 65–66 and 69.

113 *S v Mulula* [2014] ZASCA 103 (29 August 2014) para 12. See also *Reuters Group plc v Viljoen NO* 2001 (2) SACR 519 (C) para 45; *S v Fani* 1994 (1) SACR 635 (E) 638e-f; *S v Jija and Others* 1991 (2) SA 52 (E) 671-68B; *R v Rickerts* 1954 (4) SA 254 (SWA) 261D-G; *R v White* 1962 (4) SA 153 (FC).

114 As it is shown in the companion article to the present which deals with judicial independence and impartiality, a similar principle, now universally accepted by the courts in the Commonwealth, was stated by Rand J in *Boucher v The Queen* [1955] SCR 16 at 23–24 where the Justice of the Supreme Court of Canada said in part that: 'The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.' See also SCC cases: *Nelles* (n 16) 170; *Canada Oxy Chemicals Ltd v Canada (Attorney General)* [1999] 1 SCR 743 para 25; *R v Stinchcombe* [1991] 3 SCR 326; *Proulx v Quebec (Attorney General)* [2001] 3 SCR 9 para 41; UKHL and PC: *R v H* [2004] 2 AC 134 (HL) para 13; *Randall v The Queen* [2002] 1 WLR 2237 (PC) para 10; *Benedetto v The Queen* [2003] 1 WLR 1545 (PC) para 54; HCA: *Libke v R* (2007) 235 ALR 517 para 71; CC of RSA: *S v Shaik* 2008 (2) SA 208 (CC) para 67.

115 In *S v Rozani*; *Rozani v DPP*, WC 2009 (1) SACR 540 (C) where the above proposition derives, it was held that the prosecutor's failure to disclose the 'J88' medico-legal report to court, resulted in serious, and gross irregularity.

116 *S v Van Der Westhuizen* 2011 (2) SACR 26 (SCA) para 32.

117 2014 (2) SACR 215 (SCA).

and fair manner and, if satisfied that the conviction is flawed, to draw that to the attention of the court, particularly where the flaw goes to the heart of the fairness of the trial at which the accused person was convicted.’¹¹⁸

Duty to Uphold the Rule of Law

It is a prosecutor’s duty to uphold the rule of law and to alert the presiding officer of the possible dangers in admitting the warning statement. As the only person likely to know exactly what evidence he was about to place before court, the prosecutor, ought to have at least sought the court’s ruling on the admissibility of the warning statement and the statement allegedly made by the police officer responsible for the arrest. The written statement before the court was a confession and could not have been admitted as it did not comply with the legal formalities. Thus, Pillay JA held in *S v Maliga*¹¹⁹ for a unanimous SCA, that since the prosecutor failed in his duty as stated above, and in the absence of these inadmissible statements, there would have been no case for the accused to answer. The appeal was allowed for lack of a fair trial in terms of section 35 of the Constitution. The accused who ought to have been discharged at the close of the state’s case in 2002, was only discharged twelve years later; and it was held that such a lengthy delay must have had ‘disastrous effects’ on the life of the appellant.¹²⁰

Information Available at the Time the Decision to Prosecute was Taken

In deciding whether to arrest a suspect, the police officer must do so on the basis of the information available to him or her.¹²¹ Thus, what constitutes reasonable suspicion on the part of the officer, has to be judged against what was known or reasonably possible of being known at the material time.¹²² Similarly, the prosecutor exercises discretion in the performance of prosecutorial duties having regard for the information before him or her.¹²³ Thus, it was held in *S v Luxana*¹²⁴ that a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be ‘reasonable and probable’ cause to believe that the accused is guilty of an offence before a prosecution is initiated and the constitutional protection afforded to dignity and personal freedom in sections 10 and 12 of the Constitution, seems to reinforce this point. It ought to follow that if a prosecution does not commence without that minimum evidence, so too, should it cease when the evidence finally falls below the threshold.¹²⁵ In light of the discretionary nature of the

118 *S v Macrae* para 28.

119 2015 (2) SACR 202 (SCA).

120 *S v Maliga* paras 20–23.

121 *Cartier v Quebec (Attorney General)* [1979] 2 SCR 474; *R v Gloub* (1997) 34 OR (3d) 743 (CA).

122 *Ruddock v Taylor* (2005) 222 CLR 612 (HCA) para 40.

123 *Minister of Safety and Security v Du Plessis* 2014 (1) SACR 217 (SCA) para 30.

124 2001 (2) SACR 703 (SCA).

125 *ibid* para 19.

prosecutorial functions, the courts are ‘overly eager to limit or interfere with the legitimate exercise of prosecutorial authority.’¹²⁶

Courts are not at Liberty to Interfere with Prosecutorial Discretion

Ordinarily, courts are not at liberty to interfere with the prosecutor’s discretion unless there are truly exceptional circumstances for doing so. This is because as *dominus litis*, the state may decide, inter alia, whether to institute prosecution; on what charges to prosecute; in which court or forum to prosecute; and when to withdraw charges. As Waglay J explained in *S v Khalema and Five Similar Cases*,¹²⁷ where magistrates in the district courts *mero motu* transferred cases from their courts to the regional court, that ‘the prosecutor is in control of the docket and was therefore in the best position to make an informed decision regarding the court of first instance, the forum for the trial and the timing of the transfer of a case, if necessary.’ In other words, in terms of the subsections of section 75 of the Criminal Procedure Act 51 of 1977, the prosecutor is ‘the party who dictates the route a case will take towards being finalised. It is the prosecutor who makes the decision. Absent this decision by the prosecutor the magistrate in the district court cannot transfer a matter out of her court to a higher court.’¹²⁸ Such a transfer could only be made at the request of the prosecutor. Finally, the prosecutor could elect to charge a person with a less serious offence. If, for instance, the state elected to charge a person under the general prohibition of a firearm without a licence in terms of section 3 of the Firearms Control Act 60 of 2000, rather than section 4, it is within its lawful authority to do so. Not only that there is no statutory provision compelling it to act otherwise, but also, its decision to prosecute the respondent under section 3 of the Act does not fall into the category warranting the court to interfere or to be prescriptive regarding the charge that was preferred.¹²⁹

However, a prosecuting authority’s discretion to prosecute is not totally immune from scrutiny from the courts which would intervene where the discretion has been improperly exercised.¹³⁰ The prosecutor who had handled the case in *Minister of Safety and Security v Du Plessis* at the magistrates’ court had a number of statements in the docket that showed that the respondent was merely an innocent bystander and that there was no basis for prosecuting him. A prosecutor’s function was not merely to have the matter placed on the roll to then simply be postponed for further investigation. A

126 *Minister of Safety and Security v Du Plessis* para 31.

127 2008 (1) SACR 165 (C) paras 21–23.

128 *S v Khalema* para 22; *S v Sehoole* 2015 (2) SACR 196 (SCA) para 10.

129 *S v Sehoole* 2015 (2) SACR 196 (SCA) paras 10–13.

130 *NDPP v Zuma* (n 8) para 37. See also *DA v Acting NDPP* 2012 (3) SA 486 (SCA); *DA v President, RSA* 2013 (1) SA 248 (CC); *NDPP v Freedom Under Law* 2014 (4) SA 298 (SCA).

prosecutor must pay attention to the contents of the docket which was not done in the present case.¹³¹

Prosecutorial Discretion Subject to Judicial Scrutiny

Finally, there is no doubt that, in spite of the deference which the courts pay to the exercise of prosecutorial powers and discretion, South African courts regard the exercise of that power as part and parcel of public power which must be subject to the Constitution, its foundational values and the rule of law. And, as it has already been shown elsewhere,¹³² the courts intervene where the exercise of the power to prosecute or not to prosecute, to discontinue prosecution or withdrawal of ongoing prosecution are subject to the constitutional principles of legality and rationality such as where the discretion was improperly exercised.¹³³ Indeed, a court should be obliged to, and, therefore, ought to, intervene if there is no reasonable and probable cause to believe that the accused person is guilty of the offence before a prosecution was initiated.¹³⁴

The first among the three cases that illustrate the South African approach only need mention here since the issue has been discussed elsewhere. Reference is here being made to the controversial *Mdluli* case¹³⁵ where the SCA had affirmed the trial judge's setting aside of the impugned decisions not to continue with Mdluli's prosecution insofar as setting it aside was justified on the grounds of legality and rationality, and not also—as the trial judge had found—on the basis that such decisions were subject to review under PAJA. It was held that Brand JA who delivered the unanimous opinion of the court, reviewed the policy considerations which informed the common law courts' reluctance to interfere with the exercise of prosecutorial discretion and held that it was the same policy considerations underlying the exclusion of a decision to institute or to continue to prosecute from the ambit of PAJA, applied to a decision not to prosecute or to discontinue a prosecution. Decisions to prosecute and not to prosecute 'were of the same genus, and that, although on a purely textual interpretation the exclusion in s 1(ff) of PAJA is limited to the former, it must be understood to incorporate the latter as well.'¹³⁶ Further, that although decisions not to prosecute are—in the same way as decisions to prosecute—subject to judicial review, it did not extend to a review on the wider basis as PAJA, but were limited to the grounds of legality and rationality.¹³⁷ With respect to the mandatory orders issued by the High Court that the

131 *Minister of Safety and Security v Du Plessis* para 34.

132 Okpaluba (n 2) 380 para 5.7.

133 See eg *Zuma v National Public Prosecution Authority* 2009 (2) SA 277 (SCA); *Democratic Alliance v President, RSA* 2013 (1) SA 248 (CC) para 37; *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP); *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).

134 *Minister of Police v Du Plessis* para 31.

135 *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).

136 *NDPP v Freedom Under Law* para 27(d).

137 *NDPP v Freedom Under Law* para 27(e).

NDPP should reinstate all the charges against Mdluli and to ensure that the prosecution of these charges were enrolled and pursued without delay; and had directed the Commissioner to reinstate the disciplinary proceedings and to take all steps necessary for the prosecution and finalisation of these proceedings, the SCA agreed with the appellants that such mandatory interdicts were inappropriate transgressions of the separation of powers doctrine. The court will only be allowed to interfere with the constitutional arrangement on rare occasions and for compelling reasons.¹³⁸

The Decision to Authorise Prosecution under POCA

It was contended in *Booyesen v Acting National Director of Public Prosecutions*¹³⁹ that the decision to authorise the prosecution of the applicant in terms of section 2(4) of the Prevention of Organised Crime Act 121 of 1998 (POCA) for committing offences contemplated in section 2(1) of the Act lacked a rational basis, since, at the time that it was made, the material relied on by the NDPP could not, viewed objectively, support a decision to prosecute him for the alleged offences. However, when the NDPP exercised a public power in arriving at the impugned decision, such decision is subject to the scrutiny of the court based on the principle of legality. Explaining the application of the legality and rationality principles, Gorven J stated, first,¹⁴⁰ that ‘the principle of legality requires that the exercise of public power “must be rationally related to the purpose for which the power was given”.’¹⁴¹ Second, rationality,¹⁴² on the other hand, is a minimum requirement applicable to the exercise of all public power since ‘decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement.’¹⁴³ Third, a rational connection means that ‘objectively viewed, a link is required between the means adopted by the [person exercising the power] and the end sought to be achieved.’¹⁴⁴ Finally, the test is therefore twofold: (a) the decision-maker must act within the law and in a manner consistent with the Constitution; he or she therefore must not misconstrue the power conferred; and (b) the decision must be rationally related to the purpose for which the

138 *NDPP v Freedom Under Law* para 51.

139 2014 (2) SACR 556 (KZD).

140 *Booyesen* (n 6) para 25.

141 *Affordable Medicines* (n 9) para 75.

142 As the Constitutional Court explained in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51 that ‘where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standards demanded by the Constitution.’

143 *Pharmaceutical Manufacturers Association of SA: In re President of the Republic of SA* 2000 (2) SA 674 (CC) para 90.

144 *Merafong Democratic Forum v President of the Republic of SA* 2008 (5) SA 171 (CC) para 62.

power was conferred. If not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.¹⁴⁵

The ‘Spy-tape’ Saga

The so-called ‘spy-tape’ case has added to the developing jurisprudence on the exercise of prosecutorial discretion to discontinue prosecution and whether such a decision would be subject to judicial review, and if so, on what grounds, was it reviewed by the Full Bench of the Gauteng Division, Pretoria in *Democratic Alliance v Acting National Director of Public Prosecutions*.¹⁴⁶ To make this rather complicated case more understandable, the author acknowledges the summaries provided by the editors of the SA Law Reports. This discussion is further aided by the summaries of the judgments of both the High Court and the SCA by presenting a factual background of the issues for the determination and the judgments of the courts. This case generated ‘controversies and litigation by the prosecuting authority to decline initially to prosecute, later institute a prosecution, and eventually to discontinue the prosecution against the [then] President, Jacob Zuma.’¹⁴⁷

The case arose from the decade-old pending prosecution of the then President of the Republic of South Africa, but was halted by the then Acting NDPP (ANDPP), Mpshe, on 6 April 2009 on the ground that the head of the Directorate of Special Operations (DSO), McCarthy, had ‘manipulated the legal process for purposes outside and extraneous to the prosecution itself’ and ‘used the legal process for a purpose other than that which the process was not designed to serve, ie for collateral and illicit purposes.’¹⁴⁸ Holding the view that it will not be possible for the accused to have the right to a fair trial, and that it will offend a general sense of justice, integrity and propriety to continue with the trial, the ANDPP concluded that in order to express one’s disapproval of abuse of process, the prosecution had to be discontinued.¹⁴⁹

The applicant, an opposition political party, had sought the intervention of the court to review, correct and set aside the decision to discontinue the criminal prosecution against Zuma, which was contained in an indictment of 27 December 2007. Seeking to review the decision on the ground of illegality and irrationality, the applicant contended that prior to the decision to discontinue the prosecution, the ANDPP, his deputies and a team of prosecutors, had all along been satisfied that the prosecution would succeed. It was after the ANDPP and his deputies had listened to an audio tape of telephone conversations between the head of the DSO and a former NDPP that the ANDPP

145 *Masetlha* (n 9) para 81. See also Etienne du Toit, Frederick de Jager, Andrew Paizes, Andrew St Skeen, and Steph van der Merwe (eds), *Commentary on the Criminal Procedure Act* Loose-leaf 1–40 (Juta 2013).

146 *DA v ANDPP* (n 13).

147 See Pieter du Toit, ‘Recent Cases, Criminal Procedure’ (2017) 30 (1) SACJ 85 para 4.

148 *DA v ANDPP* (n 13) para 40.

149 *ibid* para 42.

changed his mind and decided to discontinue the prosecution.¹⁵⁰ The respondent, argued that having regard to the DSO's conduct, the ANDPP was justified in deciding to discontinue the prosecution and that his decision was rational.¹⁵¹ It was further contended that even if the merit of the State's case was strong, the decision to discontinue the prosecution was rational and justified because, according to the contents of the recorded conversations, the NPA's independence would be affected and it would be seen as meddling in political decisions. Further, the fact that the DSO's plan to negatively influence the election of Zuma as President of the African National Congress, was unsuccessful, was immaterial. The abuse was of such a serious nature that the decision not to prosecute was rational.¹⁵² One may ask: was it the province of the NDPP to protect the courts from abuse of their process in advance of initiating such a process or to pre-determine what constitutes a fair trial before the trial stage is reached in a matter? That both these questions must be answered in the negative was confirmed by the Gauteng Full Bench.

In a unanimous judgment, the court made a number of findings on the issues contested. It held, first, that the court of law was the appropriate forum to deal with the abuse of its process, not the NPA,¹⁵³ an extra-judicial body.¹⁵⁴ Prior to the decision to discontinue the prosecution, the ANDPP had subscribed to the view that the allegations raised in the recordings and the representation by Mr Zuma's legal team had to be subjected to the judicial process, if anything, to test the veracity thereof. But, that the ANDPP

150 *ibid* paras 44–45.

151 *ibid* para 50.

152 *DA v ANDPP* (n 13) para 51.

153 See also in *HKSAR v Lee Ming-tee* case No FACC 1 of 2003 para 184 where the Court of Appeal of Hong Kong stated that: 'Although the question is debateable, the better view is that an abuse of process does not exist independently of, and antecedently to, the exercise of judicial discretion. The judicial decision that there is an abuse of process which requires the grant of a stay is itself the result of the exercise of a judicial discretion. It is for the judge to weigh countervailing considerations of policy and justice and then, in the exercise of the discretion, decide whether there is an abuse of process which requires a stay.'

154 Query: would it have made any difference if the court had found, as the courts in Canada maintain, that the prosecutorial function performed by the Attorney General, the equivalent to that performed by the NDPP in South Africa, is quasi-judicial? In addition to the well-known cases cited above—*Nelles* (n 16) 170; *Krieger* (n 16); *Miazga* (n 17); *Proulx* (n 114) para 62—there is the recent Federal Court judgment in *Taman v Canada (Attorney General)* 2015 FC 1155 (CanLII) para 17 where Madam Justice Kane accepted certain unchallengeable submissions made by the DPP to the effect that: (a) independence is central to the prosecutorial decision-making process; (b) prosecutorial decision-making process is quasi-judicial in nature; (c) prosecutors exercise of quasi-judicial duties in the public interest and must be free from partisan political influence; and that (d) federal prosecutors should abstain from any political activity. See also *Picha v Presiding Coroner Dolan* 2008 BCSC 818 (CanLII) para 22; *Driskell v Dangerfield et al* 2007 MBQB 142 (CanLII) para 51; *R v Mohla* 2012 ONSC 30 (CanLII) para 78.

‘inexplicably and irrationally abandoned this view’.¹⁵⁵ Second, legal authorities did not support the decision taken by the ANDPP in an instance such as the present, where the abuse of process doctrine is applied in an extra-judicial exercise of public power, when the prosecution against the accused is discontinued. In this instance, the basis of the alleged abuse of process rested on legally untested allegations, which were unrelated to the trial process and the charges. Therefore, the conduct of the ANDPP, by not referring the complaint of abuse of process, and the related allegations against the DSO, to court, rendered his decision irrational.¹⁵⁶ Third, the statements in the ANDPP’s and Zuma’s answering affidavits of the previous conduct of the DSO was meant to describe his character as an officer who was inclined to meddle in political affairs, and nothing more. It was information already well-known to the ANDPP, even before he heard the tapes of the conversations. It was irrational to contend that it constituted the basis upon which the prosecution was to be discontinued.¹⁵⁷ Fourth, another irrationality relating to the ANDPP’s decision to discontinue the prosecution, was his failure to source the views of the senior members of the NPA with whom he had previously discussed the matter. This omission was critical, considering that up to 31 March 2009, they had collectively discussed the matter and had agreed to continue with the prosecution. Although they were earlier briefed on the contents of the tape, they, themselves heard the tape on 31 March 2009 with the ANDPP and would individually have formed an opinion on the matter. It was irrational not to have sought that opinion.¹⁵⁸ Fifth, that the ANDPP failed to explain how the information he had heard on the tape could be said to have affected, compromised or tainted the envisaged trial process and the merits of the intended prosecution. In fact, in the address announcing his decision, the ANDPP conceded that the alleged conduct of the DSO had not affected the merits of the charges against Zuma. There was therefore no rational connection between the need to protect the integrity of the NPA and the decision to discontinue the prosecution against Zuma. He totally ignored the concerns he had previously raised prior to the making of the decision, that is, that the information from the tape and the representation from Zuma’s lawyers had to be investigated, verified and the tapes authenticated.¹⁵⁹ Sixth, in his own words on 1 April 2009, the ANDPP stated that he felt angry and betrayed by what he had heard on the tape recordings. Apparently, his feelings of anger and betrayal caused him to act impulsively and irrationally, considering the factors already stated. He did not allow himself time to consider the question whether the very decisions he was about to take could be regarded by other people, facing similar charges throughout South Africa, as a

155 *DA v ANDPP* (n 13) para 68. The SCA had held in the earlier case of *NDPP v Zuma* (n 8) para 56 that a prosecution is not wrongful merely because it was brought for an improper purpose. On the other hand, prosecution would only be wrongful if, in addition, reasonable and probable grounds for it did not exist, a matter which, in any event, can only be determined by a court ‘once criminal proceedings have been concluded’.

156 *DA v ANDPP* (n 13) para 71.

157 *ibid* para 78.

158 *ibid* para 83.

159 *ibid* paras 88–89.

breach of the principles of equality before the law, or that it would be an abuse of process to discontinue charges against people of high profile or standing in the community.¹⁶⁰ The conflict between Zuma's defence and the prosecution's evidence could only be determined if all the evidence the prosecution and Zuma wished to adduce was presented and tested in a court of law;¹⁶¹ and lastly, having regard to the evidence before the court, the ANDPP found himself under pressure and thereupon decided to discontinue the prosecution of Zuma. Considering the situation in which he found himself, the ANDPP ignored the importance of the oath of office which demanded of him to act independently and without fear or favour, yet, he proceeded to make an irrational decision. The court concluded that Zuma's envisaged prosecution was not at all tainted by the allegations against the DSO. Therefore, the accused should accordingly face the charges against him as outlined in the indictment.¹⁶²

The SCA on the 'spy tape' saga

In their consolidated application for leave to appeal against the High Court's decision to the SCA in *Zuma v Democratic Alliance*,¹⁶³ both Zuma and the NPA conceded, shortly after the hearing commenced, that the NPA's decision to discontinue the prosecution was flawed. In particular, that it was irrational and that the ANDPP had incorrectly invoked section 179(5)(d) of the Constitution and section 22(9) of the National Prosecution Act 32 of 1998 (NPA Act) in reviewing his own decision to prosecute, when that section only authorised him to review other directors' decisions to prosecute. In assessing whether these concessions were correctly made, the SCA had to determine whether there were additional reasons to set aside the decision to discontinue the prosecution.

The SCA held, first, that the recordings on which the ANDPP had relied, even if taken at face value, did not impinge on the propriety of the investigation of the case against Mr Zuma on the merits of the prosecution itself. Collectively, the conversations did not show a larger political design, nor was there any indication of clarity of thought on the part of the former NDPP or the DSO about how either former President Mbeki or Zuma would be decisively advantaged or disadvantaged by the service of the indictment on either side of the elective conference time line.¹⁶⁴ Second, the authenticity and legality of the recorded conversations on which the NPA relied, ought to have received greater consideration. The question of the admissibility of the recordings as evidence and the

160 cf the balancing exercise arising from the court's exercise of its discretion in matters of this nature of which the House of Lords spoke in *R v Latif* [1996] 1 WLR 104 (HL) at 360H-J and 361D-E; the weighing in the balance of the public interest in ensuring that those charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that 'the end justifies any means'.

161 *DA v ANDPP* (n 13) para 90.

162 *ibid* para 92.

163 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA).

164 *ibid* paras 79 and 94.

issues referred to were never seriously addressed by the NPA. Instead, the NPA allowed itself to be cowed into submission by the threat of the use of the recordings, of which, the legality of the possession was doubtful.¹⁶⁵ Third, the allegations of political machinations to influence the timing of the indictment were based largely on conjecture and supposition. And even if it were accepted that the DSO had an ulterior motive, it was, in any event irrelevant, because such conduct would be unconnected to the integrity of the investigation of the case and the prosecution itself; it was not practically possible to have the indictment served before the conference; and there were other sound reasons—accepted to both the ANDPP and the Minister of Justice and Constitutional Development—that dictated service of the indictment after the elective conference.¹⁶⁶

Fourth, the manner in which the affidavits were obtained and the case conducted on behalf of the NPA was inexcusable. The picture that emerged from the documents filed in court *a quo* was of an animated Mr Hofmeyr, straining to find justification for the discontinuation of the prosecution. He had discounted the objective fact the indictment could in any event not be served before the ANC conference because it had only been finalised on 27 December 2007. It was not clear as to how the service of the indictment after the conference would ultimately and conclusively have impacted more severely on Zuma than if it had been served before the conference.¹⁶⁷ Fifth, the submission on behalf of the NPA and Zuma that the DSO had a central role in the timing of the service of the indictment, was contradictory to the account provided by the NPA in relation to who had made the decision about the timing of the service of the indictment. That explanation itself impacted negatively on the ANDPP's credibility and on the soundness of his decision to discontinue the prosecution.¹⁶⁸ Sixth, the exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution was evidently deliberate and irrational. These were senior litigators steeped in the case, acquainted with the legal issues and had a critically important contribution to make regarding the ultimate decision to terminate the prosecution.¹⁶⁹

Seventh, the case law cited in the ANDPP's media announcements as forming the basis for the decision to discontinue prosecution did not support his submission. On the contrary, the cases, including a Supreme Court of Appeal decision¹⁷⁰ overlooked by the ANDPP, were to the effect that questions of abuse of process in relation to a prosecution should be decided by a trial court and not by way of an extra-judicial pronouncement.¹⁷¹ Eighth, the ANDPP's stated purpose for discontinuing the prosecution was to preserve the integrity of the NPA and to promote its independence. In the circumstances, this

165 *Zuma v Democratic Alliance* (n 163) paras 63 and 94.

166 *ibid* paras 65–74, 80, 90 and 94.

167 *ibid* paras 80 and 94.

168 *ibid* paras 85 and 94.

169 *ibid* paras 89 and 94.

170 See per Harms DP, *Zuma v NDPP* 2009 (1) SA 141 (SCA) paras 37–38.

171 *Zuma v Democratic Alliance* (n 163) paras 28–29, 86, 88 and 94.

could hardly be said to have been achieved; rather, the opposite was the case. It was inimical to the preservation of the integrity of the NPA that a prosecution be discontinued because of a non-discernible negative effect of the timing of the service of an indictment on the integrity of the investigation of a case and on the prosecution itself. There was thus no rational connection between the ANDPP's decision to discontinue the prosecution on that basis and the preservation of the integrity of the NPA.¹⁷² Lastly, in reviewing his own decision to institute criminal proceedings against Zuma, and ultimately making the decision to terminate the prosecution, the ANDPP wrongly invoked and relied on section 179(5)(d) of the Constitution and section 22(9) of the NPA Act. These provisions deal with the review by the NDPP of a decision of a DPP and were inapposite. Thus, the concessions on behalf of Mr Zuma and the NPA that, on that basis the decision to terminate the prosecution was liable to be set aside, was correctly made.¹⁷³

Conclusion

The judicial review of prosecutorial discretion is one area of public law where South African jurisprudence is more advanced than others in the Commonwealth. However, all will agree that the prosecutor must be independent of political influence; must act fairly and in the public interest; and that the courts are not at liberty to interfere in the exercise of prosecutorial discretion. The common law position, which remains unchanged in Canada is that prosecutorial discretion is only reviewable by the courts in exceptional circumstances where it is exercised in such a manner as to amount to an abuse of process or constitute a misfeasance in public office or where it is shown that the prosecutor withheld relevant information which he or she had been under a constitutional obligation to disclose. This, notwithstanding the existence of a modern Constitution, the Charter of Rights and Freedoms and the progressive interpretative stance adopted by the Supreme Court of Canada regarding constitutional and human rights adjudication in particular. As in South Africa, where courts do not draw a distinction between prosecutorial discretions and police investigative duties on the matter of determining delictual liability, so, too, do they not generally distinguish between prosecutorial discretion and the exercise of public power in the judicial review process. So, except that, in principle, courts exercise a level of restraint from undue interference with the exercise of prosecutorial discretion, they do not exempt the exercise of prosecutorial functions from judicial scrutiny emanating from the Constitution, from which emanates the rule of law. In South Africa, prosecutorial discretion is reviewable on the constitutional principles' grounds of legality and rationality as in the exercise of every public power. The South African case law

¹⁷² *ibid* paras 83–84 and 94.

¹⁷³ *ibid* para 94.

discussed in this article abundantly illustrates this point, and here lies the difference between prosecutorial discretion and judicial review in Canada and South Africa.

References

- Baker DJ, 'The Provincial Power to (Not) Prosecute Criminal Code Offences' (2017) 48(2) *Ottawa Law Review* <<https://doi.org/10.2139/ssrn.2914001>>
- Black's Law Dictionary* (6th edn, Thomson Reuters 1990).
- Du Toit E, De Jager F, Paizes A, St Skeen A, and Van der Merwe S (eds), *Commentary on the Criminal Procedure Act* Loose-leaf (Juta 2013).
- Du Toit P, 'Recent Cases, Criminal Procedure' (2017) 30 (1) *South African Journal of Criminal Justice*.
- Du Toit P, 'Recent Cases, Criminal Procedure' (2015) 28 *South African Journal of Criminal Justice*.
- Du Toit PG and GM Ferreira, 'Reasons for Prosecutorial Decisions' (2015) 18 (5) *Potchefstroom Electronic Law Journal* <<https://doi.org/10.4314/pelj.v18i5.08>>
- Martin AF, 'The Immunity of the Attorney General to Law Society Discipline' (2016) 94(2) *Canadian Bar Review*.
- Maqutu L 'When the judiciary flouts separation of powers: Attenuating the credibility of the National Prosecuting Authority' (2015) 18(7) *Potchefstroom Electronic Law Journal* <<https://doi.org/10.4314/pelj.v18i7.08>>
- Okpaluba C, 'Judicial Review of Executive Power: Legality, Rationality and Reasonableness (2)' (2015) 30 (2) *Southern African Public Law* <<https://doi.org/10.25159/2522-6800/3586>>
- Okpaluba C, 'Judicial Review of Executive Power: Legality, Rationality and Reasonableness (Part 1)' (2015) 30(1) *Southern African Public Law* <<https://doi.org/10.25159/2522-6800/3532>>
- Okpaluba C, 'Prosecutorial Independence and Impartiality: South Africa and Canada in Comparative Perspective (1)' (2018) 32 (1) *Speculum Juris*.
- Okpaluba C, 'Prosecutorial Independence and Impartiality: South Africa and Canada in Comparative Perspective (2)' (2018) 32 (2) *Speculum Juris*.
- Okpaluba C, 'Prosecutorial Independence and Impartiality: South Africa and Canada in Comparative Perspective (3)' (2019) 33(1) *Speculum Juris*.
- Okpaluba C, 'Judicial Review of Executive Power: Legality, Rationality and Reasonableness (Part 2)' (2015) 30(2) *Southern African Public Law* <<https://doi.org/10.25159/2522-6800/3586>>

Paciocco P, 'Seeking Justice by Plea: The Prosecutor's Ethical Obligations during Plea Bargaining' (2018) 63(1) McGill Law Journal <<https://doi.org/10.7202/1054351ar>>

USLEGAL.COM, 'Prosecutorial Discretion Law and Legal Definition' <definitions.uslegal.com/p/prosecutorial-discretion/> accessed 15 October 2016 <<https://doi.org/10.1525/california/9780520283053.003.0002>>

Woolley A, 'Receiving the Standard Conception of Prosecutor's Role' (2017) 95(3) Canadian Bar Review.

Cases

500 West 174 St v Vasquez 67 Misc.2d 993, 325 NYS 2d 256.

Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC).

Agwasim v Ojichie [2004] All FWLR 1600.

Ahamefuna v Olawunmi (1988) 2 NWLR (75) 156.

Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC).

ARC v JPD Construction (Nig) Ltd [2003] FWLR (153) 251.

Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328, [2005] 2 WLR 1324 (PC).

Batistatos v Roads and Traffic Authority of New South Wales (2006) 227 ALR 425.

Benedetto v The Queen [2003] 1 WLR 1545 (PC).

Booyesen v Acting National Director of Public Prosecutions and Others 2014 (2) SACR 556 (KZD).

Boucher v The Queen [1955] SCR 16.

Canada (Minister of Citizenship & Immigration) v Tobiass [1997] 3 SCR 391.

Canada Oxy Chemicals Ltd v Canada (Attorney General) [1999] 1 SCR 743.

Cardile v Led Builders Pty Ltd (1999) 198 CLR 380.

Cartier v Quebec (Attorney General) [1979] 2 SCR 474.

D'Orta-Ekenaike v Victoria Legal Aid (2005) 214 ALR 92.

DA v Acting NDPP 2012 (3) SA 486 (SCA).

DA v President, RSA 2013 (1) SA 248 (CC).

Democratic Alliance v Acting National Director of Public Prosecutions 2016 (2) SACR 1 (GP).

Democratic Alliance v President, RSA 2013 (1) SA 248 (CC).

Dietrich v The Queen (1992) 174 CLR 509.

Driskell v Dangerfield et al 2007 MBQB 142 (CanLII).

Freedom Under Law v National Director of Public Prosecutions 2014 (1) SA 254 (GNP).

Gauteng Gambling Board v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA).

Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC).

Hamilton v Oades (1989) 166 CLR 486.

Henry v British Columbia (Attorney General) (2015) 383 DLR (4th) 383 (SCC).

Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order 1994 (1) SA 387 (C).

Hinse v Canada (Attorney General) 2015 SCC 35.

HKSAR v Lee Ming-tee case No FACC 1 of 2003.

Hunter v Chief Constable of the West Midlands Police [1982] AC 529.

Idoko v Ogbeikwu [2003] FWLR (149) 1530 (CA).

Ikonne v COP (1986) 4 NWLR (36) 473.

Kotoye v Saraki (1991) 8 NWLR (211) 638.

Krieger v Law Society of Alberta [2002] 3 SCR 372.

L (a child) v Reading Borough Council [2001] 1 WLR 1575.

Libke v R (2007) 235 ALR 517.

Lobel v Trade Bank of New York 132 Misc. 643, 229 NYS 778.

Macrae and Another v S 2014 (2) SACR 215 (SCA).

Maliga v S 2015 (2) SACR 202 (SCA).

Masetlha v President of the Republic of South Africa 2008 (1) SA 566 (CC).

Merafong Democratic Forum v President of the Republic of SA 2008 (5) SA 171 (CC).

Merson v Cartwright [2005] UKPC 38 (PC).

Metropolitan Bank Ltd v Pooley (1885) 10 App Cas. 210.

Miazga v Kvello Estate [2009] SCR 339 (SCC).

Minister of Safety and Security v Du Plessis 2014 (1) SACR 217 (SCA).

Mitchell v Attorney General, Natal 1992 (2) SACR 68 (N).

National Director of Public Prosecutions v Freedom Under Law 2014 (4) SA 298 (SCA).

NDPP v Freedom Under Law 2014 (4) SA 298 (SCA).

NDPP v Zuma 2009 (2) SA 277 (SCA).

Nelles v Ontario [1989] 2 SCR 170.

Oceanic Sun Line Special Shipping Co Inc. v Fay (1988) 165 CLR 197.

Okafor v Attorney General of Anambra State (1991) 3 NWLR (200) 659.

Pharmaceutical Manufacturers Association of SA: In re President of the Republic of SA 2000 (2) SA 674 (CC).

Picha v Presiding Coroner Dolan 2008 BCSC 818 (CanLII).

Priest v Union Agency 174 Tenn 304, 125 SW2d 142.

Proulx v Quebec (Attorney General) [2001] 3 SCR 9.

Public Drug Co v Breyer Ice Cream Co 347 Pa 346 A 2d 413.

R v Anderson [2014] 2 SCR 167.

R v Anderson 2015 SCC 35 (SCC).

R v Babos 2014 SCC 16 (CanLII).

R v Beare [1988] 2 SCR 387.

R v Brown 2014 BCSC 1689 (CanLII) 4 September 2014).

R v Cawthorne 2016 SCC 32.

R v Cook 1997 CanLII 392 (SCC).

R v Cook [1997] 1 SCR 1113.

R v Felderhof 2003 CanLII 37346 ONCA.

R v Gill 2012 ONCA 607 (CanLII).

R v Gloub (1997) 34 OR (3d) 743 (CA).

R v H [2004] 2 AC 134 (HL).

R v JSR 2012 ONCA 568.

R v Latif [1996] 1 WLR 104 (HL).

R v Lyons [1987] 2 SCR 309.

R v Mohla 2012 ONSC 30 (CanLII).

R v Nixon [2011] 2 SCR 566.

R v O'Connor [1995] 4 SCR 411.

R v Osborne (1975) 25 CCC (2d) 405 (NBCA).

R v Osiowy (1989) 50 CCC (3d) 189 (Sask.CA).

R v Power [1994] 1 SCR 601.

R v Regan [2002] 1 SCR 297.

R v Rickerts 1954 (4) SA 254 (SWA).

R v Stinchcombe [1991] 3 SCR 326.

R v T (V) [1992] 1 SCR 749.

R v TV [1991] 1 SCR 749.

R v Wehmeier CMAC-553; 2014 CMAC 5.

R v White 1962 (4) SA 153 (FC).

Randall v The Queen [2002] 1 WLR 2237 (PC).

Reuters Group plc v Viljoen NO 2001 (2) SACR 519 (C).

Ridgeway v The Queen (1995) 184 CLR 19.

Ruddock v Taylor (2005) 222 CLR 612 (HCA).

S v Fani 1994 (1) SACR 635 (E).

S v Jija and Others 1991 (2) SA 52 (E).

S v Luxana 2001 (2) SACR 703 (SCA).

S v Mulula [2014] ZASCA 103 (29 August 2014).

S v Rozani; Rozani v DPP, WC 2009 (1) SACR 540 (C).

S v Sebofi 2015 (2) SACR 179 (GJ).

S v Sehoole 2015 (2) SACR 196 (SCA).

S v Shaik 2008 (2) SA 208 (CC).

S v Van Der Westhuizen 2011 (2) SACR 26 (SCA).

Sanders v Snell (1998) 196 CLR 329.

Rush v Commissioner of Police (2006) 150 FCR 165, 229 ALR 383.

Sharma v DDPP Trinidad and Tobago [2007] 1 WLR 780 (PC).

Smyth v The Queen [1971] SCR 680.

Sookhai v Attorney General of Trinidad and Tobago [2007] TTHC 47.

Sriskandarajah v United States of America [2012] 3 SCR 609.

Talikota v Attorney General [2009] UKPC (PC).

Taman v Canada (Attorney General) 2015 FC 1155.

The State v Marquis [2006] TTHC 41.

Vancouver (City) v Ward [2010] 2 SCR 28 (SCC).

Varawa v Howard Smith Co Ltd (1911) 13 CLR 35.

Williams v Spautz (1992) 174 CLR 509 (HCA).

Zuma v Democratic Alliance 2018 (1) SA 200 (SCA).

Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another 2018 (1) SACR 123 (SCA); 2018 (1) SA 200 (SCA).

Zuma v National Director of Public Prosecution 2009 (1) SA 141 (SCA).

Legislation

Constitution of the Republic of South Africa, 1996.

South African Police Services Act, 1995.